

CURTIN MITCHELL  
and  
STAND

IBLA 84-85

Decided August 31, 1984

Appeal from decision of the Eugene, Oregon, District Office, Bureau of Land Management, denying protest of the Carpenter Spreadout Timber Sale, E-83-10.

Affirmed as modified.

1. Timber Sales and Disposals

A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed absent a showing that the decision is clearly erroneous.

2. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Rules of Practice: Appeals: Generally -- Timber Sales and Disposals

A party challenging a decision to harvest timber on the grounds that clearcutting is an inappropriate method to be employed and that pertinent environmental considerations were disregarded bears the burden of establishing both the factual predicates and the ultimate conclusions.

3. Act of Oct. 15, 1966 -- Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales

Where the record reflects that the BLM decision not to do class III onsite cultural resource studies on the timber sale units was made without the consultation process as required by 36 CFR 800.4(a)(1), BLM will be required to so consult and to take whatever further action is required as a result of the consultation process prior to any entry by the timber purchaser.

APPEARANCES: Curtin Mitchell, Lorane, Oregon, pro se, and as president for Save Trees Against Needless Destruction (STAND); Melvin D. Clausen, District Manager, Eugene, Oregon, for Bureau of Land Management.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Curtin Mitchell and Save Trees Against Needless Destruction (STAND) seek reversal of a decision dated September 30, 1983, by the Eugene, Oregon, District Office, Bureau of Land Management (BLM), denying their protest of the Carpenter Spreadout Timber Sale, E-83-10. This tract was offered for sale on September 29, 1983.

Background

The Carpenter Spreadout sale contemplates a contract of 24 months duration for cutting and removal of timber on the following described land in Lane County, Oregon: SW 1/4 sec. 23 and N 1/2 NW 1/4, NE 1/4 SW 1/4, SE 1/4 sec. 31, T. 20 S., R. 5 W., Willamette Meridian. The area lies within the Lorane Resource Area planning unit, a part of the Siuslaw master planning unit. The harvest of timber in the Lorane Resource Area, including the Carpenter Spreadout sale, has been deemed necessary by BLM to fulfill the area's commitment to the allowable cut required by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O & C Act), 50 Stat. 874 (43 U.S.C. § 1181a (1982)).

Under the O & C Act, revested Oregon and California Railroad Grant lands classified as timberland are to be managed by the Secretary of the Interior under sustained yield principles "for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities." 43 U.S.C. § 1181a (1982).

Appellants oppose the Carpenter Spreadout sale, which encompasses a large area of old growth stands, primarily because of its employment of clearcutting as the method of harvesting.

The Board has attempted to condense appellants' specific objections to the subject timber sale into a manageable format for decision, inasmuch as their supporting brief consists of several hundred pages of argument and supplemental material.

Summary of Contentions1. Preservation of old growth stands

Appellants object to the removal of old growth stands in the Carpenter Spreadout sale on grounds that these stands are needed to provide habitat diversity, including protection of spotted owl and big game.

2. Environmental and economic effects of clearcutting

Appellants contend that clearcutting 110 acres in the sale area will perpetuate a pattern of old growth removal that either has or will adversely affect the Siuslaw watershed, fish habitat, and plantlife. It is alleged that further clearcutting will "not leave a forest to manage" and

that alternative harvesting techniques, such as selection cutting, should be considered.

### 3. Environmental assessment

In March 1982 BLM released a supplemental environmental assessment (SEA) regarding the Lorane Resource Area's timber sale plan for fiscal year 1983, which included the units under review in this appeal. 1/ Appellants contend BLM's environmental assessment is deficient in the following respects: Lack of or incomplete cultural resource studies; lack of a multidisciplinary review; and lack of opportunity for public comment, among other things. 2/

BLM filed a response to appellants' allegations on March 5, 1984. Appellants requested an opportunity to comment on the BLM answer. BLM objected, citing the effects of delay on its timber management program and requested that its decision be placed in full force and effect pending the decision on appeal, or, in the alternative, that the appeal receive expedited consideration. On May 17, 1984, the Board issued an order denying appellants' request to file a reply to BLM's answer brief, denying BLM's motion that its decision be given immediate effect, and granting BLM's request for expedited consideration. 3/

### Discussion, Findings, and Conclusions

[1, 2] The applicable standard of review in a case of this nature is that so long as BLM policy or implementing action is based on a consideration

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1/ The SEA supplements two previous reports, viz., the Timber Management Final Environmental Impact Statement (FEIS) which describes BLM's 10-year timber management program on forest lands in the western United States, and Timber Management, a Programmatic Environmental Analysis Record for Western Oregon (PEAR), prepared in 1974. See SEA at 4. Of these reports, only the SEA appears of record. The FEIS is variously described by BLM as having been prepared in 1978 (see August 1982 Decision Statement on the Lorane Resource Area SEA at page 5); in 1975 (see BLM Answer Brief at page 1); and in 1974 (see SEA at page 4). We will cite the report as the 1975 FEIS in deference to counsel's representation. Selected excerpts from the FEIS are appended to BLM's answer brief.

2/ Allegations previously stated in the summary of appellants' contentions are omitted.

3/ Notwithstanding the Board's order of May 17, 1984, denying appellants' request to respond to BLM's answer, appellants filed a reply brief on June 26, 1984. As noted in the order denying an extension of time to file a rebuttal brief, the regulations governing appeal procedures before the Board of Land Appeals authorize submission of a statement of reasons for appeal, 43 CFR 4.412, and an answer by adverse parties served with the notice of appeal. 43 CFR 4.414. The regulations make no provision for filing of further "rebuttal" briefs. Although this Board will not generally ignore any relevant information presented for its attention, a point is reached where the parties must stand on the briefs submitted and review on appeal must proceed. The order of the Board granting the request for expedited consideration found that such a point had been reached. Hence, the Board has not considered the rebuttal brief in rendering this decision.

of all relevant factors and is supported by the record it will not be disturbed, absent a clear showing that it is contrary to statute or regulation, or otherwise erroneous. See In re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983); Alan Winter, 62 IBLA 299 (1982).

To appellants' contention that old-growth stands in the Carpenter Spreadout sale must be preserved to provide habitat diversity, including the protection of the spotted owl and big game in the area, BLM responds as follows: BLM does not have a policy which requires cutting only old-growth and mature timber, and, in fact, the timber management plan under which the Carpenter Spreadout sale was offered prescribes practices of mortality salvage and commercial thinning. Further, BLM prepared the site-specific SEA for this sale by "tiering" it to the 1975 FEIS and PEAR reports, both of which considered long-range and residual impacts of the decadal harvest plan. BLM adds that, although current thinking on the importance of old-growth timber and its impact on habitat diversity were addressed in the development of the most recent timber management plan, 4/ prior to its adoption, the district has deferred the harvest of several thousand acres of old-growth forest located across a full range of geographical and environmental variables so as not to preclude the possible adoption of the alternatives developed for the 1983 FEIS. BLM states that appellants have incorrectly described the sale area and proposed cutting schedule under the subject sale. Thus, for example, old-growth timber will remain directly across the road for the whole length of Unit 10.1. In section 31, Unit 10.2 is bounded by old-growth timber on all sides except for approximately 800 feet on the southwest boundary. This adjacent area contains a stand of timber approximately 20 years old. There are no uncut, previously sold units and no sales are planned for the area adjacent to Unit 10.2 in the next 5-year sale plan. Unit 10.3 is bounded on the north and west by privately owned areas which contain 30- to 40-year old timber, bounded to the east by an area logged in 1974 and planted in 1975, and bounded to the south by an area logged in 1978 and planted in 1979.

Contentions with respect to the Spotted Owl Plan were answered as follows:

Prior to implementation of the ROD [Record of Decision], the Eugene District complied with direction provided by the Oregon State Office of BLM for the interim protection to 23 pair of spotted owls until the final timber management plan was complete. This allocation was based on the original recommendations of the Oregon Endangered Species Task Force that BLM protect habitat for 90 pairs of spotted owls in western Oregon. A subsequent agreement between BLM and the Oregon Department of Fish & Wildlife committed BLM to temporary harvest deferral of habitat

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4/ The FY 1984-1993 timber management plan was developed for use subsequent to this timber sale. Forest management issues relating to habitat diversity are addressed in the Eugene District Timber Management Plan FEIS (May 1983) and the Record of Decision (ROD) for the foregoing plan (September 1983). BLM states, however, that the Carpenter Spreadout sale was planned to be compatible with the current timber management plan.

for 90 pairs of owls until a reevaluation of habitat needs was made in October 1988. Based on the land-use allocations presented in the RODs for the five western Oregon districts, the Eugene District will be responsible for 13 pairs of spotted owls in habitat deferred during this five year period. The Carpenter Spreadout Sale contains no owl habitat involved in either the interim protection of 23 pairs or the harvest deferral for the habitat of 13 pairs.

(Answer Brief at 4).

The record contains excerpts from the 1975 FEIS which discuss the ecological interrelationships of the forest community, including an analysis of the factors that affect plant and animal life.

From the record presented, the Board concludes that appellants' concerns regarding the effects of the proposed sale on habitat diversity are largely based on incomplete information, misperceptions of the process being challenged, or both.

We turn to appellants' contention that clearcutting is an inappropriate method of timber harvesting in general and that such cutting will perpetuate negative impacts on the Suislaw watershed, fish habitat, and plantlife. The 1975 FEIS (under which the Carpenter Spreadout sale was offered) examined selection cutting as an alternative form of timber harvesting. Selection cutting is advanced by appellants as preferable to clearcutting. The alternative described assumed the same allowable cut level as the action proposed. Impacts to soil, water, wildlife, recreation, and other resources were evaluated by the FEIS as more severe under selection cutting than under clearcutting, primarily because a much larger portion of the commercial forest land base would be entered for harvest each year. In addition, BLM states that species such as the Douglas fir, of which the subject stands are primarily comprised, are "more or less intolerant (light demanding) and are most effectively regenerated by clearcutting" (Answer Brief at 2). The Church report, 5/ relied on by appellants, substantiates the BLM position by acknowledging that professional forestry witnesses advocate the need for clearcutting of certain important tree species if those species are to be reforested successfully (Church at 1). Further, the report recommended that timber management activities on Federal lands should be subject to certain policy guidelines, including the principle that clearcutting be used only where it is determined to be silviculturally essential 6/ to accomplish the relevant forest management objectives (Church at 9). BLM concluded that clearcutting is silviculturally necessary in the case of the Carpenter Spreadout Timber Sale because of the need to open the stand for reforestation of Douglas fir.

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5/ "Clearcutting on Federal Timberlands," Report by the Subcommittee on Public Lands to the Committee on Interior and Insular Affairs, United States Senate, 92d Cong., 2d Sess., Mar. 1972.

6/ Where it is essential for the care and production of trees in the region.

In National Wildlife Federation v. U.S. Forest Service, No. 83-1153, slip op. (D. Ore. April 3, 1984), the court found that the Forest Service had not violated the Church guideline when it concluded that clearcutting was silviculturally essential, even though the Service failed to make a formal finding to that effect initially. The court stated, "This is an area of particular agency expertise. The court should not second guess the Forest Service's determination of what is or is not silviculturally essential." National Wildlife Federation, *supra* at 12. In light of the reasoned opinion for utilizing clearcutting in the Carpenter Spreadout sale offered by BLM in this case, we cannot uphold appellants' challenge to that decision.

Appellants' concerns about the effects of clearcutting on the Siuslaw watershed are addressed as follows by BLM:

Watershed values in the affected area are considered adequately protected. In accordance with our Memorandum of Understanding with the Oregon Department of Environmental Quality, BLM's forest management practices meet or exceed the objectives of the statewide water quality management plan, including those for slope stability, stream channel stability, stream temperature and suspended sediment. As to the appellant's request that "definite hydrologic guidelines be established," one of the reasons for the Timber Production Capability Classification (TPCC) inventory was to classify land where clearcutting could be done. The site-specific analysis for each sale reviews the classification and adds other measures necessary to a specific proposed sale.

The appellant makes reference to the need for providing timbered buffers on first and second order streams. First order streams are the smallest streams shown on BLM planimetric maps. A second order is formed where two first order streams flow together. Two second order streams create a third order stream, etc.

On page 44 of his Statement of Reasons, the appellant states "the third order stream in Unit 10.1, which enters Gardner Creek (a well-known spawning area) will not be protected with a buffer." In fact, there is no third order stream in Unit 10.1. The stream system originating in Unit 10.1 is a first order stream and is second order where it enters Gardner Creek.

The Eugene District protects unstable sideslopes with buffer strips adjacent to streams of any order. Under the current timber management plan, riparian areas adjacent to streams orders three and larger are all withdrawn from timber production. This allocation was not relevant to the subject sale, since the sale does not contain a third order stream.

The Eugene District protects stream adjacent sideslopes which are greater than 80 percent and also considered unstable. The 80 percent guideline originated from a USFS Mapleton Ranger District inventory that showed that slope failures are more prevalent on stream-adjacent sideslopes greater than this. The

Carpenter Spreadout Sale was also evaluated for other indicators of soil instability. These indicators are: evidence of prior movement, high groundwater areas, and "pistol-butted" and "jackstrawed" trees [terms describing deformities in the normal growth of trees caused by soil movement]. The two special soil protection areas shown on the sale area map (Exhibit A) are the only areas with slopes greater than 80 percent and evidence of possible instability.

The appellant makes more specific charges about the adequacy of watershed protection on pp. 49-51 of the statement of reasons. Clearcutting the "impact area above the steep slopes" will only minutely affect soil water velocity because the soils in this area are relatively deep and fine textured (clay loam to clay) and have slow hydraulic conductivities. During the critical slope stability period (winter months when the soil profile is saturated and evapotranspiration is low), clearcutting the "impact area above the steep slopes" will increase soil water volume by only one to two inches per month. Because of the soil's slow hydraulic conductivity, this additional water will move slowly through the soil and should not cause a significant soil water volume surge. Field investigations revealed no points of significant groundwater accumulation other than the stream channels and their heads. Therefore, the small additional soil water volume should be evenly and slowly distributed and released.

Significant differences in soil type, geology, and depth to bedrock exist between the area of Unit 10.1 and the pictured landslide area shown as an example of prospective damage on page 50 of the appellant's statement of reasons. This landslide area is located in Section 11, T. 20 S., R. 4 W., approximately 6-7 air miles east of Unit 10.1. This landslide was probably initiated by increased groundwater created by a road ditch which concentrated much larger than normal volumes of water onto the area of the slide. Also, the soils in this area are shallow (less than 2 feet) and become saturated much sooner than the deeper soils on Unit 10.1. The water in the road ditch has since been diverted to allow for even distribution.

(Answer Brief at 3-4).

Appellants appear to base their claims regarding fish habitat on the assumption that the impacts of past management have been damaging and, therefore, the proposed action, which "is a thread in the management fabric" will also be damaging. See Statement of Reasons at 44. However, after a review of the record before us, we conclude that appellants have not met their burden of establishing both the factual predicates and the ultimate conclusion.

Appellants' final contention is that the environmental assessment is deficient. BLM has responded thoroughly to each point raised by appellants showing, among other things, that appellants' facts are frequently incorrect and that they failed to apprehend the interrelationships of the various environmental documents.

BLM has demonstrated that there was ample opportunity for appellants to comment on the environmental reports during the public comment phase of their preparation. Public comments were, in fact, received and evaluated in connection with the 1974 PEAR and 1975 FEIS. The 1983 Annual Timber Sale SEA was made available for public review in April 1982 following a news release to local news media and a notice of availability was sent to people and groups on BLM's timber sale mailing list. 7/ No comments were received on the Carpenter Spreadout Timber Sale.

Appellants allege a lack of multidisciplinary review on the environmental documents. The record shows otherwise. An interdisciplinary team consisting of specialists in forestry, soils, wildlife, cultural resources, and the other affected disciplines participated in the preparation of the 1974 PEAR, 1975 FEIS, and 1983 SEA.

Although appellants' observations, recommendations, and critiques reflect many instances of disagreement with the determinations made by BLM, they fall short of showing that BLM's judgment was clearly erroneous or contrary to applicable law or regulation. The Board has a general obligation to defer to BLM's expertise where its actions are taken pursuant to defined statutory authority and where its determinations are supportable. An appellant's judgment cannot be substituted for that of BLM on the basis of arguable differences of opinion. See In re Otter Slide Timber Sale, 75 IBLA 380 (1983); In re Lick Gulch Timber Sale, *supra*; Oregon Wilderness Coalition, 71 IBLA 67 (1983); Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981).

[3] Finally, we examine appellants' objections regarding the cultural resource inventory completed on the Carpenter Spreadout Timber Sale. Appellants assert that "[n]o cultural resource on-site study or literature search has been done on Units 10.2 and 10.3 in Sec. 31 and the information on Unit 10.1 in Sec. 23 is based on an old report which is of marginal value." BLM responds:

The appellant is correct that no on-site cultural resource surveys were done on Units 10.2 and 10.3. The cultural resource specialist had conducted on-site surveys of the preliminary sale unit plan, but did not receive notice that the location of the units had changed. Unit 10.1, in the revised sale plan, had been subjected to a Class II cultural resource inventory conducted for BLM by the University of Oregon during 1979. As partial fulfillment of the contract requirements, University of Oregon crews surveyed 4800 acres of BLM administered land in the Coast Range at a Class III level of inventory, including 960 acres (16.2%) of BLM-administered lands within T. 20 S., R. 5 W. in which the subject sales are located.

When the oversight was discovered, the Eugene District cultural resource specialist reviewed the revised sale plan according

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7/ BLM noted that it "was not aware of any specific request from Lorane Area residents to be notified when a specific tract of timber is proposed for sale."



to procedures described in 36 CFR 800 and current BLM policy, described in Instruction Memo No. 83-746, August 4, 1983 (Attachment No. B).

This reevaluation by the cultural resources specialist, based on study of relief maps and aerial photographs and the 1979 University of Oregon survey, concludes that in the three units in question "the steep (from a cultural resources standpoint), dissected terrain effectively precludes the potential for cultural resource values." [Emphasis added.]

(Answer Brief at 6).

This situation differs from the one the Board reviewed in the case In re Lick Gulch Timber Sale, supra at 313-17. In that case the Board found that the EIS and the BLM Manual required a class III on-site inventory. Here, the SEA requires only that cultural inventories be conducted prior to the sales. Further, a policy change was directed by Instruction Memorandum No. 83-746, August 4, 1983, which states:

Effective with the date of this Instruction Memorandum, BLM Manual Section 8111 will be read as a general how-to Manual. Determining when to apply various classes of cultural resources inventory may be guided by the Manual, but decisions reached through the consultation process in 36 CFR 800 will control. Class III inventory to full Manual specifications may not always be necessary where ground disturbances of land disposal is proposed. Because cultural resource survey conditions and methods vary from region to region, class III inventory methods will conform to the prevailing professional cultural resource survey standards for the region involved. [Emphasis supplied.]

The memorandum dated July 12, 1983, by the Associate Solicitor, Energy and Resources, to the Director, BLM, on Cultural Resources Inventory Requirements calls attention to the role of the State Historic Preservation Officer when determining the need for cultural resources surveys and the nature of the survey necessary for a particular action. The regulations at 36 CFR 800.4(a)(1) provide that:

The Agency Official shall consult the State Historic Preservation Officer \* \*  
\* to determine what historic and cultural properties are known to be within the area of the undertaking's potential environmental impact. The State Historic Preservation Officer should provide the Agency Official with \* \* \* a recommendation as to the need for a survey of historic and cultural properties, and recommendations as to the type of survey and/or survey methods should a survey be recommended, and recommendations on boundaries of such surveys. [Emphasis added.]

The record before us provides no evidence that any consultation occurred or, if such consultation did occur, what recommendations, if any, were made by the State Historic Preservation Officer. While we do not find that appellants' allegations persuade us that BLM failed to fulfill its obligations by

its decision not to do a class III on-sire inventory, we do find that, if BLM did not consult with the State Historic Preservation Officer under the procedures of 36 CFR 800.4(a)(1) and as directed by Instruction Memorandum No. 83-746, *supra*, BLM failed to fulfill its obligations.

Thus, if such consultation did not occur, BLM is directed, prior to entry by the timber purchaser, to meet its obligations by applying the appropriate class of cultural resource inventory to the subject sale as determined by the decision reached through the consultation process in 36 CFR 800. 8/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified to require the consultation herein discussed, if it has not occurred, and whatever further action is required as a result of the consultation process.

Wm. Philip Horton  
Chief Administrative Judge

We concur:

R. W. Mullen  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

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8/ See In re Lick Gulch Timber Sale, *supra*, for a discussion of the various classes of cultural inventories.

